IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. .....

PHIL RYAN,

Petitioner,

vs.

IONE CROSS, RUBY CROSS, AN INFANT, BY IONE CROSS, HER NEXT FRIEND, ET AL., ETC.

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The final order of the United States Circuit Court of Appeals for the Seventh Circuit denying petitioner's motion for a rehearing is dated January 14, 1942 (R. 288). The opinion of the United States Circuit Court of Appeals, upon which the judgment of the United States District Court for the Eastern District of Illinois was affirmed, is dated November 11, 1941, and appears at pages 282-287 of the Record. The opinion is reported in 124 F. (2) 883.

II.

JURISDICTION OF THE UNITED STATES SUPREME COURT.

Petitioner contends that this court has jurisdiction to issue the Writ of Certiorari upon the following grounds:

(1) The statute believed to sustain the jurisdiction of this court to issue the Writ of Certiorari is subsection (a) of Section 240 of the judicial code of the United States as amended (28 U. S. C. A. Sec. 347), which empowers the Supreme Court of the United States by certiorari to require that there be certified to it for review and determination, either before or after a judgment or decree by such lower court, with the same power and authority, and with like effect as if the cause had been brought there by unrestricted Writ of Error or Appeal.

(2) The date of the decision and order to be reviewed is January 14, 1942 (R. 288) and the written opinion of the United States Circuit Court of Appeals for the Seventh Circuit is dated November 11, 1941 (R. 282-287).

III.

STATEMENT OF THE CASE.

A statement of the case involved has been given under heading "I" in the Petition for a Writ of Certiorari and in the interest of brevity is not here repeated.

IV.

SPECIFICATION OF ERRORS.

A. The United States Circuit Court of Appeals erred in finding and holding that the suits herein brought under

the Illinois Dram Shop Statute (Ch. 43, Sec. 135, Illinois Revised Stats. 1939) are of a civil nature within the meaning of the Judicial Code of the United States (28 U. S. C. A. Sec. 41) so as to confer jurisdiction upon the United States District Court for the Eastern District of Illinois to entertain such suits.

B. The court erred in finding and holding that as a matter of law Counts I, IV, VII and X and Counts III, VI, IX and XII of the amended complaint stated causes of action under the Illinois Dram Shop statute.

C. The court erred in finding and holding that there was competent evidence adduced to support Counts I, IV, VII and X, and Counts III, VI, IX and XII of the amended complaint.

D. The court erred in affirming the judgment of the United States District Court and in refusing to reverse said judgment with directions to dismiss the amended complaint or to reverse and remand the cause for a new trial.

BRIEF AND ARGUMENT.

I.

The United States Circuit Court of Appeals, 7th Circuit, erred in holding that the suits herein brought by the plaintiffs were of a civil nature within the meaning of the Judicial Code of the United States (28 U. S. C. A. Sec. 41).

(a) Section 135 of the Illinois Dram Shop Act in question is a highly penal statute.

The statute which petitioner contends is highly penal and upon which the plaintiffs' causes of action are premised provides:

> "135. Actions for damages caused by intoxication.) 14. Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons, who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with

the person or persons selling or giving alcoholic liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suit and to control the same and the amount recovered as a *feme sole;* and all damages recovered by a minor under this Act shall be paid either to such minor, or to his or her parent, guardian or next friend as the court shall direct; *and the unlawful sale, or giving away, of alcoholic liquor, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place;* and all suits for damages under this Act may be by any appropriate action in any of the courts of this State having competent jurisdiction." (Ch. 43, Sec. 135, Ill. Rev. Stats. 1939.) (Italics ours.)

The title of the Alcoholic Liquor Control Act or Dram Shop Act reads:

"An Act Relating to Alcoholic Liquors."

Thereafter, in the very first section of the Act it is provided as follows:

"This Act shall be liberally construed, to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors." (Ch. 43, Sec. 94, Ill. Rev. Stats. 1939.)

The principal purpose and object of this Statute was to promote temperance in the consumption of alcoholic liquors by fostering and promoting sound and careful control and regulation of the manufacture, sale and distribution thereof and to punish those who in any form furnish means of in-

toxication by making them liable for a penalty in the form of damages which might arise through the acts of those persons whose intoxication was caused by such means. Ch. 43, Sections 94, 96, 97, 103, 108, 115, 118, 119, 120, 122, 124, 125, 126, 127, 127(a), 129, 131, 132, 133, 134, 136, 137, 138, 140, 141, 145, 146, 147, 151, 155, 156 (Ill. Rev. Stats. 1939); *Hyba* v. *C. A. Horneman, Inc.*, 302 Ill. App. 143, 147; *Bardon* v. *Nudelman*, 369 Ill. 214, 216; *A. & P. Tea Co.* v. *Mayor of Danville*, 367 Ill. 310, 313; Black on "*Intoxicating Liquors*" (1892) p. 333; *Mead* v. *Stratton*, 87 N. Y. 493, 496.

To illustrate: Section 96 sets forth the scope of the Act and designates those persons amenable thereto; Sec. 97 provides for the creation of the Illinois Liquor Control Commission; Sec. 103 makes it a misdemeanor for any one subject to the provisions of the Act to offer any gift or other gratuity to any commissioner or his employees; Sec. 108 provides for the powers and duties of the Commission; Sec. 115 provides for the different kinds of licenses that may be issued; Sec. 118 provides for the fees for the licenses; Sec. 119 circumscribes the privilege granted by the licenses; Sec. 120 enumerates those persons who are ineligible for a license; Sec. 122 *makes it unlawful* for any licensee to accept, receive or borrow money from any manufacturer or distributor of liquor and unlawful for any manufacturer or distributor to give or lend money to any licensee; Sec. 124 provides for the affixing of revenue stamps, labels and seals; Sec. 125 requires each manufacturer or distributor to keep a record of all liquor manufacturer, sold or delivered in Illinois; Sec. 126 provides for revocation of the license of any manufacturer or distributor who sells or delivers liquor to unauthorized persons; Sec. 127 provides that no license shall be issued for the sale of liquor within a designated distance of any church, school, hospital, etc.; Sec. 127(a) provides that no license shall be issued to any person whose principal business is selling

school supplies to minors; Sec. 129 precludes retail sales of liquor on election days; Sec. 131 prevents sales to minors, drunkards and mental incompetents; Sec. 132 *makes it unlawful* for any licensee to become liable or pay or make any contribution to any political party or candidate for public office and *imposes a fine and imprisonment* for a violation thereof; Sec. 133 prevents a licensee from denying equal accommodations to all citizens; Sec. 134 forbids the sale or furnishing of liquor at retail to any person on credit, etc.; Sec. 136 makes any judgment obtained by virtue of Sec. 135 (the section in question here) a lien on the real estate in which the tavern is being operated and provides for foreclosure of such lien; Sec. 137 *makes it unlawful* for a retailer to fill or refill an original package or sell, except in the original package; Sec. 138 voids agreements between manufacturer and retailer wherein the latter agrees not to sell the product of another manufacturer; Sec. 140 forbids the possession of liquor in a motor vehicle except with the seal unbroken; Sec. 141 forbids obstructions in the premises of a licensee which prevents a clear view into the premises from the street; Sec. 145 provides the requisites for application for state license; Sec. 146 provides for license fees and bonds; Sec. 147 provides for the revocation of the license, and *forfeiture of the bond in the event any licensee shall be convicted of a violation of any of the provisions of the Act;* Sec 151 provides for a complaint and hearing for violations of the Act; Sec. 155 provides for *penalties* and *forfeiture* of state and local licenses upon conviction of a violation of the provisions of the Act; Sec. 156 prevents the use of premises wherein liquor was sold for one year upon revocation of the license of licensee (See Ch. 43, Ill. Rev. Stats. 1939).

In determining the scope and arriving at the true intent of the statute, the title of the Act as well as every other section of the Act should and must be considered, for the real object and purpose of the Legislature is to be gathered

from an examination and comparison of the context of the whole Act. *Cruse* v. *Aden*, 127 Ill. 231, 236-237.

In Section 135 itself there is a provision for a forfeiture under certain circumstances. The second from the last clause in that section provides:

> "And the unlawful sale, or giving away, of alcoholic liquor, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place;"

In other words, the petitioner at bar might be subject to the forfeiture provided inasmuch as he has already been convicted for an "*unlawful sale * * * of alcoholic liquor.*"

In addition to the foregoing forfeiture specifically imposed by Section 135, the defendant is also amenable to the provisions of Sections 147 and 155 as well as all other sections above enumerated.

Section 147 provides:

> "If a licensee shall be convicted of the violation of any of the provisions of this Act, or his license shall be revoked and no appeal is taken from said order of revocation or any appeal taken therefrom is decided adversely to the licensee, the said bond (if one is required) shall thereupon be forfeited and in the case of a state license the state commission shall institute suit upon such bond in its own name for the entire amount of said bond and costs. In any action brought on any such bond the state commission shall be represented by the attorney general." (Chapt. 43, Ill. Rev. Sta. 1939.)

Section 155 provides:

> "Whenever any licensee shall have been convicted by any court of a wilful violation of any of the pro-

visions of this Act, he shall, *in addition to the penalties for such offense,* incur a forfeiture of his state and local license and all moneys that have been paid therefor; the local commission shall thereupon revoke his license or the State commission shall revoke his license as the case may be." (Chapt. 43, Ill. Rev. Sta. 1939.)

In the case of *Hyba* v. *C. A. Horneman, Inc.,* 302 Ill. App. 143, the Court said at page 147:

> "The evident object (of the statute) *is to punish* those who furnish means of intoxication by making them liable in damages caused thereby." (Italics ours.)

In *Bardon* v. *Nudelman,* 369 Ill. 214, the Court said at page 216:

> "On the othed hand, the Liquor Control Act is primarily an exercise of the police power. Section 1, of Article I thereof, provides that the Act shall be liberally construed *'to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquor shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors';"* (Italics ours.)

See also: *A. & P. Tea Co.* v. *Mayor of Danville,* 367 Ill. 310 at 313.

This rule of the Illinois courts had previously been promulgated by Mr. Black in his book on "Intoxicating Liquors" (1892) at page 333, and in the case of *Mead* v. *Stratton,* 87 N. Y. 493, 496.

The United States Circuit Court of Appeals in its opinion did not consider the principal object of the Statute in question and because of failure to do so committed error.

The Court said:

> "The test is whether the action brought to recover under the cause of action given by the statute is essentially *a suit to vindicate a private right* as distinguished from punishment in a criminal action." (R. 284.) (Italics ours.)

Section 135 is one section among many in the "*Alcoholic Liquor Control Act*" and is enacted under the same title as all the other sections. If it is ruled that the Statute gives a right of action "*to vindicate a private right*" as was done by the Circuit Court of Appeals, the Statute is repugnant to *Article IV, Section 13* of the Illinois Constitution of 1870, for the reason that the statute as so construed has an independent subject which is incongruous, disconnected and without any natural relation to the object desired by the enactment of the whole Alcoholic Liquor Control Act. *Cruse* v. *Aden*, 127 Ill. 231, 235-237; *Campe* v. *Cermak*, 330 Ill. 463, 468; *The People* v. *Horan*, 293 Ill. 314, 318-319; *The People* v. *Clark*, 301 Ill. 428, 436.

Article IV, Section 13 of the Illinois Constitution provides among other things that:

> "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed."

In *The People* v. *Clark*, 301 Ill. 428 at page 436, the Court said:

> "The purpose of the provision of the Constitution which prohibits the passage of an act embracing more than one subject and which requires that subject to be expressed in the title of the act is to prevent the in-

sertion in a bill of matters which bear no relation to the title, by means of which members of the Legislature would be led to vote for a measure which they would not knowingly have approved. Without this restriction any number of incongruous matters might be aggregated in one bill and the title of the act give no hint as to the provisions of the act that were to follow. This restriction not only protects the members of the Legislature from deception but it likewise protects the public."

It is inescapable that the action given to a plaintiff nder Section 135 is not "*essentially a suit to vindicate a rivate right*" but is a suit to recover a penalty against he defendant under a highly penal statute. If the matters ontained in the statute are so limited and so construed hey legitimately appertain to and are in some way conected with the sale and distribution of alcoholic liquor nd thereby become germane to the subject expressed in he title of the Act, whereas if a private remedy is given plaintiff for damages sustained in consequence of the ntoxication of another, means are provided not connected irectly or indirectly with the liquor traffic or with any ale of liquor and it cannot fairly be said such means re embraced or expressed in the title of the Act.

The private remedy given to the plaintiffs provided nly the means by which the principal purpose and object f the statute may be effectuated or accomplished; the amages sustained and recovered are incidental and are ut the measurement of the amount of the penalty imposed pon the defendant for transgressions of the statute. *arned* v. *Tiernan*, 110 Ill. 173, 178; *Stewart* v. *Brady*, 00 Ill. 425, 432; *Raisor* v. *C. & A. R. R. Co.*, 215 Ill. 47, 55; *adsden* v. *Woodward*, 103 N. Y. 242, 243, 8 N. E. 653.

The method that the Legislature of Illinois adopted in easuring the amount of the penalty to be imposed under

the statute against a particular defendant is unimportant. The penalty corresponds with and is gauged by the damages sustained, both actual and exemplary. The procedure adopted by allowing a penalty in the form of damages, to be assessed by court and jury, is a convenient and equitable way arriving at the amount thereof. Such procedure is not new in Illinois. *Larned* v. *Tiernan*, 110 Ill. 173, 178; *The People* v. *Hartford Life Ins. Co.*, 252 Ill. 398, 406; *Stewart* v. *Brady*, 300 Ill. 425, 428.

Under Illinois law there can be no objection to the view above expressed.

In *Larned* v. *Tiernan*, 300 Ill. 426, the plaintiff brought an action on the case, which action is purely civil in form, to recover treble damages, a penalty, under a gambling statute. The defendant therein contended that the statute under which the action was brought was void as being antagonistic to Article IV, Section 13 of the Illinois Constitution. The Court said at page 178:

> "Now, in the bearing upon the question, here, of making a different subject, which must be expressed in the title of the act, we may see the unimportance of the distinction insisted on, *of criminal and civil proceeding*, and of the giving of a civil remedy to the person injured, in an act relating to crimes and their punishment. Upon this question, as we have seen it, it is the *effect of the means* provided which tells. It is not the technical designation. * * * In this respect of operative effect it matters not where the recovery of that which has been won goes,—whether into the State treasury, county treasury, school fund, into the hands of a common informer, or to the person losing; nor by what mode the recovery is had,—*whether by a criminal or civil procedure;* nor what the name given to the adopted means,—whether fine, penalty, forfeiture or *damages.* * * * In that regard the only

thing essential is, what is the provision in its effect, as being in aid of the purpose of the act." (Italics ours.)

The penal character of this statute is further shown by an analysis of the action at bar. The petitioner Phil Ryan committed no wrong at all against the decedent Fred (George) Cross or against the latter's dependents who are plaintiffs in this suit. If any wrong was done to the deceased or his dependents it was the result of a wilful and wanton assault by a third party, George Stout, out of the presence of and unknown to the petitioner.

Section 135 of the statute thereby imposes a liability upon the petitioner for a wrong which was not his and is in consequence of doing a forbidden act. The act that was forbidden to the petitioner was causing the intoxication of George Stout, but said intoxication did not in any way relieve the said George Stout of either criminal or civil responsibility. The action brought under the statute gives the plaintiff a remedy not otherwise allowed under the law of Illinois and is in that respect remedial, but the statute inflicts punishment on the defendant for a transgression which he did not commit. Civil liability thus imposed on the defendant under Illinois law is in every sense a penalty. *Klages* v. *Kohl*, 127 Ill. App. 70, 73.

Let us consider the position of the owner of the building in which the tavern is being operated even though he is not a party defendant in this case. He is by the statute made equally liable with the tavern operator for all damages sustained by a plaintiff, including exemplary damages. Moreover, in most cases such owner has nothing to do with causing or bringing about the intoxication of anyone or bringing about injury whatsoever to anybody. All he does is rent his property to be used in conducting the liquor business. In addition to being required to respond *in personam* as a defendant in the suit with the tavern operator,

the owner's property in which the liquor is sold, is subject to foreclosure to satisfy any judgment obtained, in that under *Section 136, Ch. 43, Ill. Rev. Stats. 1939,* a lien automatically attaches against the property as soon as judgment is recovered. This lien attaches even though judgment was obtained against the tavern operator by default and without the knowledge of the owner of the property. *Garrity* v. *Eiger,* 272 Ill. 127, 133.

In addition to the liability thus imposed upon the owner his premises may not be used after revocation of the license of the tavern operator for a period of one year thereafter for the conduct of the business of manufacturing, distributing or selling alcoholic liquor (Ch. 43, Sec. 156, Ill. Rev. Stats. 1939).

There is a further reason why Section 135 does not grant *"a suit to vindicate a private right."* The constitutionality of Section 135 has been upheld as a valid exercise of the state police power. *O'Connor* v. *Rathje,* 368 Ill. 83, 86; *Garrity* v. *Eiger,* 272 Ill. 127, 134; *Bardon* v. *Nudelman,* 369 Ill. 214, 216; *A. & P. Tea Co.* v. *Mayor of Danville,* 367 Ill. 310, 312-315. But a valid exercise of the police power must have for its object the prevention of some offense of manifest evil or the preservation of the *public health, safety, morals or general welfare. A. & P. Tea Co.* v. *Mayor of Danville,* 367 Ill. 310, 316; *Lawton* v. *Steele,* 152 U. S. 133, 136, 38 L. Ed. 385, 388; 12 *C. J.* 929.

The creation, therefore, of a private remedy which is *"essentially"* to *"vindicate a private right"* has no justification under the police power because such power considers only the *public health, comfort, safety and welfare.*

The whole matter boils down to the proposition: If the opinion of the United States Circuit Court of Appeals is adopted and allowed to stand, Section 135 of the *Alcoholic Liquor Control Act* is by interpretation therein an

unconstitutional statute as being repugnant to *Article IV, Section 13 of the Illinois Constitution.* But if the Statute is interpreted to be penal in conformity with the letter and spirit of the Constitution and Illinois decisions the Statute is constitutional. We submit that the constitutionality of the statute must be maintained under those decisions holding that where a statute is susceptible of two constructions, one of which will render it unconstitutional and the other constitutional, that construction will be adopted which sustains the validity of the statute. *Cruse* v. *Aden,* 127 Ill. 231, 236-237; *Italia America Shipping Corp.* v. *Nelson,* 323 Ill. 427, 439; *Winter* v. *Barrett,* 352 Ill. 441, 458.

The United States Circuit Court of Appeals said in its opinion:

> "We have found no case in Illinois directly in point. In two cases where the court was considering the statute of limitations as applied to the section in question and a similar section under a prior statute, the Illinois Court of Appeals had held that the two-year statute of limitations applicable to actions for the recovery of a penalty did not apply. *O'Leary* v. *Frisbey,* 17 Ill. App. 553; *Desiron* v. *Peloza,* 308 Ill. App. 583, 32 N. E. (2d) 316." (R. 283-284.)

A study of the *O'Leary* v. *Frisbey* and *Desiron* v. *Peloza* cases does not support this statement of the Circuit Court of Appeals. In neither of those cases was the question as to whether the statutes was or was not penal raised or discussed. In *O'Leary* v. *Frisbey* the court decided, at page 554 of the opinion, that the period of limitations on an action for loss of support was five years, but a study of the opinion shows that that question was not before the court for decision. The first error raised in that case by the appellant was the ruling of the trial court that the five-year period of limitation applied, but upon appeal the

appellant waived that question. The Illinois Appellate Court said in its opinion:

> "The first error assigned is the action of the court in sustaining the demurrer to the second plea. The two-years statute of limitation does not apply to the action brought by appellee, and there was no error in sustaining the demurrer. *The learned counsel for appellants, although assigning this error, make no reference to it in their brief.*" (Italics ours.) (*O'Leary* v. *Frisbey*, 17 Ill. App. 553, 554.)

The Illinois Appellate Court in the *O'Leary* case, therefore, was not aided in any way by briefs of the attorneys. The question consequently was not properly before the court and became, because of that fact, mere *obitur dictum.*

In *Desiron* v. *Peloza*, 308 Ill. 582, the issue concerning the penal nature of the statute was not raised or discussed in the case. The precise issue that is raised by the defendant in the case at bar, therefore, was not decided.

The Statute of Limitations referred to by the Circuit Court of Appeals limits actions to a period of 2 years on several subjects therein besides actions for a statutory penalty (Chap. 83, Sec. 15, Ill. Rev. Stats. 1939). The Illinois Appellate Courts, therefore, never intended to hold that Sec. 135 of the Dram Shop Act was not a penal statute. Had arguments been made and the applicable cases cited the Illinois Appellate Courts referred to would have been compelled to hold the statute penal.

The United States Circuit Court of Appeals said further in its opinion:

> "We therefore hold that where the suit is brought in an individual plaintiff's name and is exclusively under the control of the plaintiff, and the recovery inures to the exclusive benefit of the plaintiff, it is a suit of

a civil nature. The case at bar is such a case." (R. 285.)

Under the Illinois decisions this statement in the court's opinion is inaccurate and erroneous, inasmuch as penal statutes in Illinois are those by which punishments are imposed for transgressions thereof and it matters not by what mode the recovery is had,—whether by a criminal or civil procedure; nor the name given to the adopted means,—whether fine, penalty, forfeiture *or damages;* nor does it matter that the suit brought is in an individual plaintiff's name or that the suit is exclusively under the control of the plaintiff or that the recovery inures to the exclusive benefit of the plaintiff. *Larned* v. *Tiernan,* 110 Ill. 173, 175; *Raisor* v. *C. & A. R. R. Co.,* 215 Ill. 47, 55; *Bell* v. *Farwell,* 176 Ill. 489, 496; *Diversey* v. *Smith,* 103 Ill. 378, 390; *Stewart* v. *Brady,* 300 Ill. 425, 432; *The People* v. *Hartford Life Ins. Co.,* 252 Ill. 398, 406; *Vestal Co.* v. *Robertson,* 277 Ill. 425; *Dabney* v. *Manion,* 155 Ill. App. 238, 243; *Klages* v. *Kohl,* 127 Ill. App. 70, 73.

Under Illinois law the penal character of a particular statute cannot be determined until the *purpose and object* of the statute is first understood. If the purpose and object of the statute is to punish those who transgress the provisions thereof, then the statute is penal and the tests announced by the Circuit Court of Appeals in its opinion are unimportant.

In the leading case of *Diversey* v. *Smith,* 103 Ill. 378, the court said at page 390:

> "A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited. It is the effect, not the form, of the statute that is to be considered, and when its object is clearly to inflict a punishment on a party for violating it—*i.e.,* doing what is prohibited, or fail-

ing to do what is commanded to be done,—it is penal in its character, *and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant.*" (Italics ours.)

The Circuit Court of Appeals said further in its opinion:

"Whether it is a suit of a civil nature is not to be determined by whether the statute is to be considered as penal or remedial for the purpose of applying the rule of strict construction." (R. 284.)

We are unable to understand why the Circuit Court of Appeals made this distinction. A penal statute such as here in question as it affects a defendant cannot be considered penal for one purpose and non-penal for another purpose. Moreover, an action brought under the Illinois Dram Shop Statute to recover damages, although such action is civil in form, is none the less an action to recover a penalty under a highly penal statute. *Emory* v. *Addis,* 71 Ill. 273, 277; *Hall* v. *Barnes,* 82 Ill. 228, 229; *Cruse* v. *Aden,* 127 Ill. 231, 239.

In *Emory* v. *Addis,* 71 Ill. 273, the court said at page 277:

"The statute is broad and sweeping in its provisions, *but the wrongs it is intended to prohibit can only be prevented by the rigid enforcement of highly penal laws.* He who deliberately sells that which he knows will inflame the passions, deprive the party of the control of his judgment, and render him for the time being, incapable of exercising proper care for personal safety, or that of his property, must be prepared for the consequences that may follow. *One risk incident to the traffic is, by the statute,* he is made responsible for all the injuries such persons may inflict." (Italics ours.)

In Illinois there is a further rule that *"a penal law may also be remedial, and a statute may be remedial in one part and penal in another."* *Bell* v. *Farwell,* 176 Ill. 489, 496. The fact therefore that the plaintiffs herein are given a remedy and a private right not otherwise provided except by the statute, does not take from the statute its penal character in its application upon the petitioner herein. *Diversey* v. *Smith,* 103 Ill. 378, 390, 400.

(b) The Federal courts sitting in Illinois are bound to follow the State court decisions on substantive and constitutional law that declares the Illinois Dram Shop Act penal.

The United States Circuit Court of Appeals in its opinion held that the suits at bar were suits of a *"civil nature"* within the meaning of Section 24 of the Judicial Code of the United States and were therefore properly brought in the Federal court (U.S.C.A., Title 28, Sec. 41).

Section 24 of the Judicial Code of the United States provides among other things:

> "The District courts shall have original jurisdiction as follows:
>
> "(1) Of all suits of a *civil nature,* at common law or in equity * * * where the matter in controversy exceeds, exclusive of interests and costs, the sum or value of $3,000.00, and * * *
>
> "(c) Is between citizens of a state and foreign states, citizens or subjects."

To support its opinion the Circuit Court of Appeals cited the case of *Huntington* v. *Attrill,* 146 U. S. 657-667-676, 36 L. Ed. 1123 (R. 285).

The Illinois Supreme Court in *Raisor* v. *C. & A. R. R. Co.,* 215 Ill. 47 at page 55, specifically rejected and disapproved the principles laid down in the *Huntington* v.

Attrill case and formulated its own tests and principles to determine whether the particular statute was penal or not. The principles laid down in the *Raisor* v. *C. & A. R. R. Co.* case were not new in the jurisprudence of Illinois but had been adhered to long before that decision and remain the law of Illinois at the present time. *Grinestaff* v. *New York Cent. R. R. Co.*, 253 Ill. App. 589, 603.

In the opinion of the United States Circuit Court of Appeals, therefore, there is squarely presented a conflict of law question between the Federal and Illinois State Court decisions and thereby raises the question: *Is a Federal Court sitting in Illinois bound to follow the State Court decisions on substantive law with reference to the public policy of the State of Illinois to determine whether a statute is penal or not?*

Since the decision in this court of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, the policy has been to enlarge upon rather than to diminish from the edicts of law announced in that case so as to promote and foster uniformity of law between the State and Federal courts "sitting side by side". *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 498, 85 L. Ed. 1477, 1480. Moreover, in diversity of citizenship cases the rules concerning conflict of laws and public policy laws are governed by the State courts. *Griffin* v. *McCoach*, 313 U. S. 498-507, 85 L. Ed. 1481.

In view of the above decisions of this Court it is clearly the duty of the Federal Courts sitting in Illinois to follow the State Court decisions to determine whether a particular statute is penal or not and to disregard or reject the general law on that subject found or decided outside of the State of Illinois.

If under Illinois law Section 135 of the Dram Shop Act is penal as to the obligations imposed upon the defendant,

has the Federal Court jurisdiction to hear and determine an action brought under that Statute even though such action is civil in form and governed by the rules of civil procedure?

The case of *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 299, 32 L. Ed. 239, 246, answers this question. This Court held in that case that the Court's jurisdiction was limited to controversies of a "*civil nature*" and that actions brought under the provisions of a penal statute were not of a "*civil nature*". The Court in the *Wisconsin* v. *Pelican Ins. Co.* case, 127 U. S. 265, said at page 299:

> "*The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offense.* It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action; or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. *In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense.*" (Italics ours.)

In *State of Iowa* v. *Chicago Burlington & Q. Rd. Co.*, 37 F. 497, 503, 3 L. R. A. 554, 559, the court in a decision rendered by Mr. Justice Brewer, analyzed and quoted from the *Wisconsin* v. *Pelican Ins. Co.* case, and said:

> "Though this case is not precisely in point, yet the thought underlying it, the principle which controlled the decision, is applicable here; and it must be adjudged that in the opinion of the Supreme Court of the United States, the ultimate authority on questions of this kind, *an action to enforce a penalty, whatever may be its form is one of a criminal nature.* As such,

within the Removal Act, it is not a removable case." (Italics ours.)

In *State of Indiana* v. *Alleghany Oil Co.*, 85 F. 870, the court said at page 873:

> "And, if this were not so, still the suit must be held not to be within the jurisdiction of this court, because, *although a civil action in form, it is in effect a suit to enforce a penal statute of the state. The contention that the action is civil, and not penal, in its nature, because the statute of the state declares it to be a civil action, is untenable.* If congress had intended that the form of the action should determine the right of removal, apt language would have been used to indicate that purpose. The language employed is '*suits of a civil nature.*' If the form, rather than the nature, of the action had been intended to determine the right of removal, congress would undoubtedly have used the words '*suits civil in form,*' or perhaps the more general expression 'civil suits,' instead of using the language employed. In using the language 'suits of a civil nature' *it discloses the intent that the court should look beyond the form to the nature or purposes of the suit.* Looking at the nature of the present suit, it is apparent that its purpose is penal." (Italics ours.)

In the above Federal cases the actions were brought by the respective sovereign States but the principles of law laid down in those cases are applicable here since the Illinois Courts do not require the action to be brought by the State in order to make the action one to recover a penalty. *Raisor* v. *C. & A. R. R. Co.*, 215 Ill. 47, 55; *Bell* v. *Farwell*, 176 Ill. 489, 496; *Diversey* v. *Smith*, 103 Ill. 378, 390; *Stewart* v. *Brady*, 300 Ill. 425, 432; *Larned* v. *Tiernan*, 110 Ill. 173, 175.

The Illinois law is not diverse from the Federal law in holding that even though the action is civil in form that fact in itself does not prevent the action from being one to recover a penalty. *Raisor* v. *C. & A. R. R. Co.*, 215 Ill. 47, 55; *The People* v. *Hartford Life Ins. Co.*, 252 Ill. 398, 406; *Robson* v. *Doyle*, 191 Ill. 566; *Rodisch* v. *Koethe*, 178 Ill. App. 286, 288; *Stewart* v. *Brady*, 300 Ill. 425, 432.

In the case of *Raisor* v. *C. & A. R. R. Co.*, 215 Ill. 47, the court said at page 55:

> "So far as private international law is concerned it matters not whether that punishment is inflicted through the instrumentality of an ordinary prosecution by the state's officers for a fine, or *through the medium of a civil action by the party injured for penal damages. In substance it is an act of punishment. It is punitive in either case.*" (Italics ours.)

By the enactment of Section 135 of the Dram Shop Act, the Illinois Legislature created an important governmental policy which it had a right to do under the police power of the State. The suits allowed under this Statute are for the purpose of enforcing this governmental policy which was to promote temperance in consumption of alcoholic liquors by fostering and promoting sound and careful control and regulation of the manufacture, sale and distribution thereof and *to punish those who in any form furnish means of intoxication by making them liable for a penalty in the form of damages which might arise through the acts of those persons whose intoxication was caused by such means.* This public policy of the State of Illinois clearly stands out as most important when it is once understood that no defendant in a dram shop case actually causes damage or injury to the plaintiff entitled to bring the suit.

In view of the foregoing authorities, we fear that the United States Circuit Court of Appeals misapprehended

the Petitioner's argument and that that Court erroneously gave undue support to the Federal authorities in the exclusion of the law of the State of Illinois in deciding that Section 135 of the Illinois Dram Shop Act was not a penal Statute. Furthermore, if the decision of the United States Circuit Court of Appeals is affirmed, a non-resident who brings suit in Illinois under the Statute will derive greater benefits than resident litigants and thereby foster the vice of non-uniformity of law within the state that the case of *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, sought to destroy, inasmuch as in an action to recover a penalty in Illinois the plaintiff cannot take the deposition of the defendant. *Robson* v. *Doyle*, 191 Ill. 566, 570; in Illinois under the present practice in civil non-penal actions, the plaintiff might require the defendant to take the stand and testify (Ch. 110, Sec. 184; Ch. 37, Sec. 388, Ill. Rev. Stats. 1939) but is denied that right if the action is brought by the plaintiff to recover a penalty. *Rodisch* v. *Koethe*, 178 Ill. App. 286, 288; in Illinois also a plaintiff can verify his complaint in which event the defendant is also required to verify his answer (Ch. 110, Sec. 159, Ill. Rev. Stats. 1939); but if the action brought is determined to be penal the defendant is excused from verifying (Art. II. Sec. 10, Illinois Constitution of 1870) *Robson* v. *Doyle*, 191 Ill. 566, 570; also under Illinois law penal actions do not survive. *Diversey* v. *Smith*, 103 Ill. 378, 385; and in the case of *Glasco* v. *Fakes*, 143 Ill. App. 378, 380, a dram shop case, the court held that upon the death of the plaintiff the action abated.

The original statute from which Section 135 was taken was enacted in 1874 (see Historical Note Smith-Hurd Annotated Statutes, Ch. 43, Sec. 135) and since that time there has been no reported case where a Federal Court has assumed jurisdiction on an action brought under that Statute.

II.

The United States Circuit Court of Appeals, Seventh Circuit, erred in sustaining the sufficiency of Counts I, IV, VII and X, and Counts III, VI, IX and XII of the amended complaint and erred in holding that one good count would validate a general verdict.

In the United States Circuit Court of Appeals Petitioner raised two errors under this point: (a) That the counts did not state a cause of action under the Statute (Ch. 43, Sec. 135, Ill. Rev. Stats. 1939), and (b) That there was no evidence to support these counts. It is axiomatic that an allegation unsupported by proof is just as objectionable as an allegation that does not state a violation of law.

In Counts I, IV, VII and X of the Amended Complaint the plaintiffs allege, among other things, that the defendant or his agent sold or gave alcoholic liquors to Fred (George) Cross, the husband and father of the plaintiffs, and that the liquor caused the intoxication of the said Cross; that the said Cross *used abusive language and assaulted George Stout; that because of the intoxication of Cross he was unable to defend himself and avoid injury;* that Stout assaulted Cross in consequence of the latter's intoxication and caused the death of the said Cross, whereupon the plaintiffs were injured in their means of support.

It is observed that in these counts George Stout, the assailant is not alleged to have been intoxicated when he assaulted and caused the death of Cross (R. 13, 16, 18, 19).

At the trial the plaintiffs produced but two witnesses that purported to know anything about the fight or altercation between Cross and Stout and the subsequent injury and death of Cross. These witnesses were James Taylor and Wesley Forester. Taylor testified that he saw Stout

and Cross on the north side of the tavern at about 12:00 midnight; that at that time Cross was on the ground and Stout was on top, hitting Cross in the face; that one Welden, Forester and the witness pulled Stout off Cross and that thereafter Stout ran and jumped in the face of Cross (R. 79-80). Forester testified to substantially the same thing except that when he saw the fight Cross was on the ground unconscious (R. 133). Neither one of these witnesses heard any argument between Cross and Stout. No one heard Cross use any abusive language toward Stout. *No one saw Cross assault Stout.* There was no proof from any source that Cross would have been more able to defend himself had he been in any other condition than he was. It can be seen, therefore, that the allegations of these counts were unsupported by any evidence in the record.

The sale of liquor to and the subsequent intoxication of the particular person does not make out a case under the statute without proof that the intoxication was the proximate cause of the injury. *Shugart* v. *Egan*, 83 Ill. 56, 57-59; *Stecher* v. *The People*, 217 Ill. 348, 349; *Sauter* v. *Anderson*, 112 Ill. App. 580, 581-584; *McMahon* v. *Sankey*, 133 Ill. 636, 640; *Hart* v. *Duddelson*, 20 Ill. App. 618, 620. And there is no allegation in these counts that charge Stout with intoxication or that charge that the intoxication of Stout was the proximate cause of the injury. Furthermore, there was no proof adduced at the trial to support the allegation in said counts that Cross used abusive language or conduct toward Stout or that Cross, because of any supposed intoxication, was unable to defend himself and avoid injury. Consequently the motion of the defendant at the conclusion of all the evidence to withdraw these counts from the consideration of the jury was improperly overruled (R. 159).

In Counts III, VI, IX and XII of the amended Complaint the plaintiffs allege, among other things, that the defendant

on the day in question, sold or gave intoxicating liquors to *Cross and Stout* and that both these men thereafter became intoxicated, after which *Cross and Stout engaged in a drunken brawl* in which Stout struck, beat and kicked Cross causing injuries from which the latter died.

As has been seen from the foregoing Illinois authorities, the intoxication, if any, of Cross is unimportant. It is the intoxication of Stout that we are concerned with in this case and it is his intoxication alone that must be the proximate cause of the death and injury of Cross. Moreover, there is no evidence that Cross and Stout engaged in a drunken brawl. As was heretofore pointed out there were but two witnesses, Taylor and Forester, who saw Stout committing the injury to Cross. There was no evidence of any brawl or fight whatsoever between Cross and Stout. When Taylor and Forester saw Cross, he was lying on the ground in an unconscious condition while Stout was beating him. The provocation or motive for the assault and injury to Cross is absent. These counts had no place in the complaint and only tended to complicate the issues and confuse the jury.

Under the law of Illinois, an injury to and death of a drunken person due to an assault by a third person who is not intoxicated is the intervening act of such third person and creates no liability upon a defendant under the Dram Shop Statute here in question. *Shugart* v. *Egan*, 83 Ill. 56, 58; *Lueken, et al.* v. *The People*, 3 Ill. App. 375, 376; *Schmidt* v. *Mitchell*, 84 Ill. 195; *Tetzner* v. *Naughton*, 12 Ill. App. 148, 153-154; *Campion* v. *Chicago Landscape Co.*, 295 Ill. App. 225, 230; *Fent, et al.* v. *Toledo, Peoria & W. Ry. Co.*, 59 Ill. 349, 351.

Before the Petitioner answered the amended complaint he filed a motion to dismiss which among other things stated that Counts I, IV, VII and X and Counts III, VI, IX and XII did not state a cause of action under the statute

(R. 22). This motion was denied (R. 25) and the Petitioner answered. At the conclusion of the plaintiffs' evidence the Petitioner moved the Court to withdraw from the consideration of the jury Counts I, IV, VII and X and Counts III, VI, IX and XII and to direct the jury to find the Petitioner not guilty on those counts for the reason that there was no evidence in the record to support those counts and that said counts did not state a cause of action under the statute (R. 159). Petitioner's motion was overruled (R. 160). Again, at the conclusion of all the evidence and after both sides had rested, the Petitioner renewed the motion that had been made at the conclusion of the plaintiffs' evidence for the same reasons that had theretofore been assigned. The Court reserved his ruling on this motion and allowed the case to go to the jury on all of the counts (R. 213). Later, in Petitioner's motion for judgment notwithstanding the verdict and for a new trial, Petitioner again raised the insufficiency of these counts (R. 261) and again the Petitioner's contentions were by the Court overruled (R. 263).

In the opinion of the United States Circuit Court of Appeals in referring to Counts I, IV, VII and X, the Court said:

> "The allegations of these counts as we have above outlined them, come clearly within the provisions of the statute and allege the causal connection between the sale of the liquor and the intoxication and the injury and the death. *Haw* v. *1933 Grill, Inc.*, 297 Ill. App. 37, 17 N. E. (2d) 70" (R. 286).

We respectfully submit that the Circuit Court of Appeals has misconstrued the meaning of the opinion in *Haw* v. *1933 Grill, Inc.*, and has overlooked the opinion of the Supreme Court of Illinois in *Shugart* v. *Egan*, 83 Ill. 56. The latter decision is, in our opinion, indistinguish-

able from the case at bar and holds that in an action for loss of support the death of an intoxicated person by the act of another who was not intoxicated does not constitute a cause of action under the Illinois Dram Shop Statute, whereas in *Haw* v. *1933 Grill, Inc.*, the Illinois Appellate Court specifically set forth distinguishing facts that make that case untenable as an authority to support the case at bar. In the *Haw* v. *1933 Grill, Inc.* case, the defendant by its servant or agent *had previous knowledge that the husband of the plaintiff would get noisy and boisterous after becoming intoxicated.* It was this factual situation that caused the Illinois Appellate Court to hold that because of the previous experience the defendant had had with the husband *it might reasonably have anticipated and foreseen the result of the actual assault that caused his injury.* (*Haw* v. *1933 Grill, Inc.*, 297 Ill. App. 37, 46).

There was not present in the case at bar any proof that the deceased husband, Cross, became boisterous or noisy when he became intoxicated; no proof that the Petitioner had any previous knowledge that the decedent would conduct himself in a noisy or boisterous manner when he became intoxicated or that the decedent would do anything to cause or bring about injury to himself by inviting an assault or otherwise.

The United States Circuit Court of Appeals in its opinion further said:

> "The defendant next challenges under his motion for a new trial the sufficiency of the evidence to support the causes of action stated in the complaint. *We have held each count good, and therefore if there is substantial evidence to sustain any one count in favor of each plaintiff, the general verdict must be upheld.*" (Italics ours.) (R. 286.)

We submit that this statement of the United States Circuit Court of Appeals is erroneous, as it has always been the law in this Court that where a complaint contains two or more separate counts or causes of action, one or more of which are substantially defective or insufficient, and a motion to strike the defective or insufficient count or counts is overruled, a general verdict based upon the entire complaint is erroneous. *Wilmington Star Mining Co.* v. *Fulton,* 205 U. S. 60, 77-78-79, 51 L. Ed. 708, 717; *Gompers* v. *Buck Stove & R. Co.,* 221 U. S. 418, 439-440, 55 L. Ed. 797, 805; *Toledo Newspaper Co.* v. *U. S.,* 247 U. S. 402, 421, 62 L. Ed. 1186, 1196.

If the opinion of the United States Circuit Court of Appeals on this question is sustained it would be vain and useless for any litigant to move to strike any count of a complaint at the conclusion of the evidence and an adverse ruling by the Trial Court could not be raised upon appeal. Such holding would encourage trial courts to submit all counts in a complaint to the jury for consideration in which event the true issues in many cases would be buried under a mass of irrelevant and immaterial evidence which would only tend to confuse and distract the jury.

In the case at bar the evidence shows affirmatively that the intoxication, if any at all, that caused the injury to the decedent was the intoxication of Stout and none other. It is undisputed in the record that the decedent was killed by Stout. If Stout was intoxicated the jury had no right under the evidence to consider any other intoxication as the proximate cause of the death of Cross. The intoxication, if any, of Cross was unimportant for the reason that under the Statute, intoxication without injury caused proximately therefrom gives no cause of action. *Shugart* v. *Egan,* 83 Ill. 56-57-59; *Sauter* v. *Anderson,* 112 Ill. App. 580, 584. If, on the other hand, Stout was not intoxicated

and Cross only was intoxicated then there was no liability on the defendant under the Statute because the death of Cross was caused by the independent, intervening act of a third person who was not intoxicated. *Shugart* v. *Egan,* 83 Ill. 56, 57-59. Furthermore, if Stout was not intoxicated the allegations of Counts II, V, VIII and XI were surplusage and only tended to confuse and distract the jury. We submit that such procedure was specifically held to be error by this Court in *Wilmington Star Mining Co.* v. *Fulton,* 205 U. S. 60, 77-79, 51 L. Ed. 708, 717, in which this court clearly decided that one good count in favor of the plaintiff will not support or validate a general verdict.

CONCLUSION.

In view of the foregoing this Petitioner respectfully submits that the United States Circuit Court of Appeals has by its construction of Section 135 of the Illinois Dram Shop Statute rendered said statute unconstitutional under the Constitution of Illinois; that the interpretation of the statute given by the Circuit Court of Appeals is in conflict with the applicable Illinois decisions and thereby contravenes an important public policy of the State of Illinois; that the Circuit Court of Appeals has sanctioned a departure in pleading and practice that is prejudicial to the substantial rights of Petitioner and is in conflict with applicable decisions of this Court; that consequently this case is one calling for the exercise by this Court of its supervisory powers and to such end a Writ of Certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Seventh Circuit and finally reverse such decision with

directions to dismiss the amended complaint for lack of jurisdiction of the District Court to entertain these suits or reverse and remand these suits for a new trial.

Respectfully submitted,

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